determine which of these network elements – *the facilities, the functions, or both* – incumbent LECs must make available on an unbundled basis."[40]

The broad, functional standard for network elements, has, at least implicitly, already been adopted by the Commission. For example, the Commission has defined local loop as UNE as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and an end-user customer premises."[41] This effectively is a broad, functional description that incorporates discrete functions of separate elements – NID (which is defined as a UNE itself), distribution cable, concentrator, and feeder cable – into a single UNE. In sum, the Commission has authority to define UNEs by function, and the Joint Commenters submit that it should expressly do so here to minimize regulatory uncertainty.

B. The Commission Should Reaffirm Its Existing OSS UNE and Create a Broad Set of Transmission-Related UNEs to Promote Voice and Broadband Competition.

As ALTS discusses in its comments in this proceeding, most of the UNEs defined by the Commission in the *Local Competition First Report and Order* are of critical importance to CLECs and satisfy any reasonable interpretation of the "necessary" and "impair" standards for unbundling. This is especially true for OSS and transmission related UNEs. Thus, the Joint Commenters submit that the Commission should re-promulgate its existing OSS UNE. Using

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40 *Id.* (emphasis added). In the *Shared Transport Decision*, several ILECs challenged the Commission's shared transport UNE on grounds that: (1) the Commission has "no power to aggregate" ILEC transmission facilities into "a single network element"; and (2) the Commission's shared transport UNE was so broadly defined that it obliterated any meaningful distinction between unbundled access to UNEs (section 251(c)(3)) and total service resale (section 251(c)(4)). The Eighth Circuit rejected both of these arguments. Moreover, the Joint Commenters note that the Local Loop itself is an aggregate of the NID and Loop.

existing UNE definitions as a starting point, the Commission should define a series of transmission-related UNEs, including the Local Loop, NID, Interoffice Transport, Signaling and Call-Related Databases, ISW, and the EEL.[42] Each of theses UNEs is discussed in the paragraphs that follow.

1. OSS

The Joint Commenters support the Commission's existing definition of OSS. In the *Local Competition First Report and Order*, the Commission noted that ILECs "argue that there are proprietary interfaces used to access [OSS] databases and information"; however, the Commission did not make a finding as to whether OSS qualifies as a proprietary network element.[43]

Even if the Commission were to determine that OSS is proprietary, the Joint Commenters firmly believe that it would meet the "necessary" standard included herein. Indeed, the Commission has noted that "it is absolutely necessary for competitive carriers to have access to [OSS] functions in order to successfully enter the local market."[44] This is so because, if

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(...continued)

41 47 CFR § 51.319(a).

42 The Joint Commenters submit that the Commission should define the EEL as a UNE *in addition to* defining the EEL as a combination. Gaining access to EELs is critical to CLECs, and by defining the EEL both as a combination as a distinct element, the Joint Commenters believe that the Commission will minimize regulatory mischief.

43 *Local Competition First Report And Order.* ¶ 521.

44 *Id.*

CLECs do not have access to the ILECs' OSS functions "in substantially the same time and manner that an incumbent can for itself, competing carriers [would] be severely disadvantaged, if not precluded altogether, from fairly competing."[45] The Joint Commenters' frustrating experience with ordering and provisioning loops, transport, and other UNEs under their interconnection agreements bears this out. Thus, even if OSS were considered proprietary, it would satisfy the "necessary" test for UNEs.

2. Local Loops

The Joint Comments fully concur with the Commission's "strong expectation" that under any reasonable interpretation of the "necessary" and "impair" standards of section 251(d), the local loop [should] be subject to the unbundling obligations of Section 251(c)(3).[46] CLEC access to the Local Loop is fundamental to competition. Congress expressly recognized the importance of access to the Local Loop as a means of fostering competition by including "unbundled loops separate from switching" in the section 271 competitive checklist.[47] By any reasonable conception, the Local Loop must be included in the list of network elements subject to Section 251(d)(2).

The Commission defines the Local Loop as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and an end user customer premises."[48] The Joint Commenters submit that this is an appropriate, technology-

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45 *Local Competition First Report and Order,* ¶ 522.

46 *FNPRM,* ¶ 32.

47 47 U.S.C. § 271(c)(2)(B)(iv).

48 47 CFR 51.319(a).

neutral definition of the Local Loop; however, the Commission should clarify that the Local Loop also includes:

1. High-capacity loops – copper or optical facilities at the DS1, DS3, and OCn levels,

2. "Clean Copper" loops – copper transmission facilities to an end-user's premises conditioned to permit transmission of digital services (including DSL) without electronics,

3. Dark fiber loops – optical transmission facilities to an end-user's premises without electronics, and

4. Any cross-connects between loops and either other UNEs or collocated equipment.

In the *Local Competition First Report and Order*, the Commission found that Local Loops are not proprietary,[49] and therefore an "impair" analysis is appropriate. No reasonable substitute for ILEC Local Loops (including high-capacity, clean copper, and dark fiber loops) exists, and ILECs are the only providers with ubiquitous Local Loops in their service territories. As for cross-connects, no ILEC substitute exists, and without cross-connects, Local Loops completely lack functionality. Thus, the Local Loop and any necessary cross-connects meet the "impair" standard described herein, and thus should be defined as a UNE on the Commission's national list.

3. NID

The Commission should reaffirm the availability of the NID pursuant to the "impair" standard of section 251(d). In the *Local Competition First Report and Order*, the

[49] *Local Competition First Report and Order* ¶ 389.

Commission found that "the record contains no evidence of proprietary concerns with unbundled access to the NID,"[50] and no reason exists to review this finding. The Commission defines the NID as "as a cross-connect device used to connect loop facilities to inside wiring,"[51] and the Joint Commenters support this definition.

Regarding the "impair" analysis, the Joint Commenters note that access to the NID is nearly as critical as access to the Local Loop. Because NIDs are dedicated to specific customers, alternatives are not available on a wholesale basis, and self-provisioning is impractical with any type of ubiquity. In addition, a customer's NID is typically the means through which ISW facilities are accessed, and without access to the ILEC NID, a competitor could lack access to a customer. Accordingly, under the "impair" standard presented herein, the Commission should retain the NID as a distinct UNE.

4. Interoffice Transport

The Joint Commenters believe that the Commission should reaffirm and expand the definition of Interoffice Transport under the "impair" standard. Interoffice Transport by no means qualifies as "proprietary." Access to interoffice transmission facilities is critical to new entrants seeking to enter local markets, and Congress recognized this by including "local transport" in the section 271 competitive checklist.[52] As the Commission has indicated, "[a]n

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50 *Id.* ¶ 393.

51 47 CFR § 51.319(b)(2).

52 47 USC § 271(c)(ii)(B)(v).

efficient new entrant might not be able to compete if it were required to build interoffice facilities where it would be more efficient to use the incumbent LEC's facilities."[53]

Moreover, lack of an Interoffice Transport UNE would further impede the spread of competition even in top-tier cities (not to mention second and third-tier cities and suburban and rural areas). To the extent that competitive Interoffice Transport is available at all, this is only true in the largest central offices within the largest cities (even here, existing transport facilities are primarily dedicated to interexchange carriers). Without an Interoffice Transport UNE, CLECs first order of business would be to construct new Interoffice Transport to obtain ubiquitous connectivity in first-tier cities to augment any currently available competitive Interoffice Transport. Only after obtaining the connectivity needed in first-tier cities would CLECs have the opportunity to further develop transport in other markets. In short, without an Interoffice Transport UNE, CLEC expansion would be impaired substantially, as would the development of competition.

In re-promulgating the Interoffice Transport UNE, the Joint Commenters recommend that the Commission clarify that Dark Fiber transport is included in the definition of Interoffice Transport. While the Commission previously found that it lacked an adequate record upon which to identify Dark Fiber transport as a UNE,[54] many state commissions have defined Dark Fiber as a UNE, suggesting that Dark Fiber satisfies any reasonable "impair" analysis.[55]

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53 *Local Competition First Report and Order* at ¶ 440.

54 *Id.* at ¶ 450.

55 For example, Dark Fiber is available in Texas, Oregon and Washington.

Thus, the Joint Commenters recommend that the Commission adopt Dark Fiber as part of the national interoffice transport UNE.

5. Signaling and Call-Related Databases

In the *Local Competition First Report and Order*, the Commission recognized that access to signaling links, signaling transfer points, and call-related databases (such as the LIDB, Toll Free Calling, and AIN databases, as well as the Service Management Systems) is critical to entry into the local markets and to the ability of new entrants to compete with incumbents on a comparable basis.[56] Indeed, the importance of signaling systems and related databases is reflected in section 271, which requires BOCs to make these items available on a nondiscriminatory basis as a precondition to entry into the in-region interLATA services market.[57]

The Commission already has found that Signaling and Call-Related databases are not "proprietary" because "SS7 signaling networks adhere to Bellcore standards, rather than LEC-specific protocols...."[58] Moreover, "[b]ecause alternative signaling methods, such as in-band signaling, would provide a low quality of service, [the Commission concluded] that a competitor's ability to provide service would be significantly impaired if it did not have access to incumbent LEC's unbundled signaling links and STPs." Thus, a Signaling and Call-Related Database UNE would satisfy the "impair" standard.

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56 *Local Competition First Report and Order*, ¶¶ 478-79.

57 271.

58 *Id.* at ¶ 481.

6. ISW (Inside Wiring)

The Joint Commenters urge the Commission to adopt ILEC-owned ISW as a new UNE. ISW, which includes horizontal and vertical house and riser cables, is the segment of transmission closest to a customer premises. To date, ILEC-controlled ISW has been a fundamental bottleneck to the deployment of competitive telecommunications service to multi-tenant establishments ("MTE"), and the Joint Commenters strongly commend the Commission's recognition of ISW in the *FNPRM*.[59]

Because ISW is not a "proprietary" UNE, the Joint Commenters submit that the Commission should analyze access to ISW under the "impair" standard. Wherever it is deployed, no substitute exists for ILEC-controlled ISW. Self-provisioning is nearly impossible in already crowded conduit spaces within buildings. Moreover, the Joint Commenters note that several ILECs, including Bell Atlantic, BellSouth, and US WEST presently offer ISW, and thus provisioning this UNE is technically feasible.[60] Because access to ISW is of fundamental importance to CLECs attempting to provide service to MTE, the Commission should adopt ISW as a national UNE in this proceeding.

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59 *FNPRM* at ¶ 33.

60 BellSouth makes inside wire available on an unbundled basis through interconnection agreements it has entered into with CLECs in Georgia, Florida, Kentucky and Tennessee; U S WEST is required to provide unbundled access to inside wire in Nebraska; and Bell Atlantic is required to provide unbundled access to house and riser cables in New York.

7. EEL

Finally, the Joint Commenters submit that the Commission should identify the EEL as a UNE, in addition to a required combination. As a practical matter, an EEL is a facility that would give CLECs access to the local loop functionality of an ILEC. Rather than forcing a CLEC to adopt the outdated distributed central office architecture of the ILEC, an EEL in effect would bring an end user's loop to a CLEC's local switch or point of collocation. Along the path to the CLEC's point of interface, EELs would be aggregated utilizing modern multiplexing technology. Once delivered to the CLEC, EELs are dependent upon the CLEC providing its own switching functionality. In this manner, an EEL represents a functional end-user "loop" connected to a CLEC switch.

The Commission has clear legal authority to define UNEs by function, including an EEL UNE. In *AT&T*, the Supreme Court found that the broad scope of the definition of "network element" included functions as well as facilities.[61] As noted earlier, the Eighth Circuit Court of Appeals has found that the statutory definition of network element expressly "includes both individual network facilities and the functions which those facilities provide, *either individually or in consort.*"[62]

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61 *AT&T* at 733. ("Given the breadth of [the definition of network element], it is impossible to credit the incumbents' argument that a 'network element' must be part of the physical facilities and equipment used to provide local phone service.")

62 *Shared Transport Decision,* 153 F.3d at 606. (emphasis added).

Defining the EEL as a single UNE also would ensure that CLECs may purchase EELs at the cost-based rates of the underlying components, as required by section 252(d) of the Act. Without an EEL UNE, ILECs in all probability will attempt to assess glue charges or similar non-cost-based-charges on EEL combinations, which would impair CLECs by artificially raising their costs. Moreover, without an EEL UNE, ILECs might not provision these transmission facilities at all. Defining the EEL as a UNE would avoid such a result.

C. The Commission Should Adopt UNEs Necessary For Providing Competitive Packet-Switched Data Services

The Joint Commenters have expended substantial time and resources in attempting to negotiate or arbitrate arrangements to interconnect their data networks with those of ILECs. In this effort, the Joint Commenters have met with only partial success – interconnection agreements established to date have been limited to certain states, and in some cases apply only to jurisdictionally intrastate frame relay traffic, limiting their utility to CLECs to something far less than that contemplated by section 251(c)(2) of the Act. These experiences negotiating with ILECs regarding the opening of their data networks make clear that the Commission should (consistent with the section 251(d)(2) standards for network unbundling and with the section 706 mandate, encourage the deployment of advanced data services) establish a series of UNEs specifically geared to the expansion of CLEC data networks.

Packet-switched networks do not follow the same hierarchical switching structure as ILEC circuit-switched networks, in which end-users are connected to each other through circuits dedicated, for the duration of communications, to those communications. Instead, a data

customer is connected to a distributed network of interconnected data switches and/or routers and transport links. This network is called a "cloud" because a customer's data transmissions are disassembled into numerous data packets prior to transmission. In a single transmission, the data may transit multiple data switches (in the case of Frame Relay and ATM) or routers (in the case of IP), which provide a variety of functions, including aggregating, hubbing, routing, and switching. Packets, which constitute a single transmission, may travel along a myriad of differing paths within this "cloud" to reach the ultimate point of termination, none of which is, at any point in time, dedicated to the communication as in the circuit-switched network. Rather, each part of the "cloud" may, and typically does, support packets from a large number of transmissions simultaneously. In addition, in order to provide the redundancy and alternate transmission paths that allow the most efficient routing, data carriers often interconnect their networks at multiple points. The net result of these features is that data networks achieve considerable efficiencies over circuit-switched networks for the type of bursty, data communications for which they designed.

In many but by no means all cases, established UNEs will provide the network elements that competitive carriers require to support the provision of data services. However, even if dedicated high capacity transport at DS1, DS3 and OCn speeds, and digitally conditioned copper loops or high speed loops, are available as UNEs, competitive carriers will be impaired in their provision of data services unless they also have access to the efficiencies that are offered by the connectivity between points within the distributed data networks of ILECs. ILECs can piggyback upon their existing network architectures, exploiting the distribution of central offices and interoffice transport capacity, to deploy a distributed, efficient packet-switched networks

with markedly fewer obstacles than CLECs. Thus, ILECs must unbundle functions that are unique to data networks, and new data UNEs must be established.

The overarching function required as a UNE by data carriers essentially provides connectivity between switching, hubbing, or routing nodes on an ILEC data network. This can involve connectivity between a data switch or router that serves an end-user and a data switch or router that serves other carriers; or connectivity between data switches or routers that serve carriers. These functions typically are reflected by several rate elements in ILEC Frame Relay and ATM cell relay service tariffs, although the terminology varies dramatically from ILEC to ILEC. The functions, however, are essentially the same – the establishment of virtual circuits between and including ports on data switches or routers. Whether this connectivity is called a "Logical Link," a "Private Network Link," or some other term, the ILEC provides a virtual circuit defined at a specific bit rate that includes and connects two data switch or router ports. The Joint Commenters ask the Commission to order ILECs to make available on an unbundled basis (1) the ports on their data switches or routers and (2) the connectivity (including the switching fabric and associated software functions) between such ports. This connectivity should be available at a series of pre-defined committed information rates. Specifically, the connectivity should be available at: 8, 16, 32, 56 and 64 kbps, every increment of 56, or 64 kbps through 1.544 Mbps, and at appropriate intermediate increments through the DS3 level.[63] The port UNEs should be available initially at the following speeds: DS0, nxDS0, DS1, and DS3.

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63 US WEST, for example, in its current tariff makes rate elements that incorporate the UNI and NNI available at 56 or 64 kbps, 112 or 128 kbps, 168 or 192 kbps, and numerous other intermediate levels below 1.544 Mbps, rather than just 56/64 kbps and 1.544 Mbps.

The rates for these UNEs may vary (*e.g.*, a port on an ATM switch may have a different TELRIC price than a port on an IP router).[64]

These data UNEs do not provide a CLEC with proprietary information, software or hardware. Accordingly, the "necessary" test does not apply. The requested UNEs meet the "impair" test. In conjunction with their own packet switches and other facilities, competitive data service providers will be able to connect these new UNEs with loops and transport – either their own, ILEC provided, or purchased from a third-party vendor – to complete virtual circuits. These new data UNEs in combination with loops, transport and possibly other UNEs will obviate the need for CLECs instantly to deploy facilities to an area comparable to that of the ILECs' distributed data networks. Data CLECs will be able to utilize the efficiencies uniquely offered by these new UNEs to help usher in robust competition in the advanced data services market. Without the availability of these data UNEs, CLECs in all cases will be forced to back haul unbundled loops to their own data switches on dedicated transport facilities, which are less efficient for purposes of data transmission. The difficulties that CLECs have had in extending

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64 The Commission should make clear that TELRIC pricing of the requested connectivity UNE must reflect the ability of carriers to oversubscribe the committed information rate of their data facilities. In other words, because the connectivity within a given virtual circuit within the packet-switched network is being used only a fraction of the time, the total committed information rate of all virtual circuits "loaded" onto a facility may be several times that of the facility itself. Thus, PVCs totaling three (or more) times 1.544 Mbps might be "loaded" onto a DS1 facility, maximizing the utilization of the data facility and drastically reducing data network costs. The Joint Commenters submit, based on their own experience in designing data networks, as well as their discussions with the ILECs with whom they have interconnected, that the Commission adopt a rule creating a rebuttable presumption that ILEC facilities are designed to accommodate 300 percent oversubscription. Parties may rebut the presumption to and justify higher or lower oversubscription rates.

their data services through interconnection arrangements cannot be overcome through the provision of reasonably available and economic substitutes for these UNEs because none exists.

The data UNEs requested herein are not exhaustive. As data networks and their technologies develop further, it may be necessary to expand the list of data UNEs or further unbundle the connectivity described herein to prevent competitive providers from being impaired in their provision of services. The Commission should make clear in its Order in this proceeding that it remains open to expanding the list of data UNEs as appropriate to encourage the development of competitive advanced communications services.

As noted above, the Joint Commenters have encountered some ILEC attempts to limit the use of Frame Relay interconnection agreements – and proposed Frame Relay UNEs – to intrastate services only. Such a restriction would, of course, improperly prohibit the use of Frame Relay UNEs (any other digital UNEs) to provide whatever telecommunications service the CLECs deem appropriate, including interstate service.[65]

IV. THE COMMISSION SHOULD REITERATE THAT ITS UNE PRICING STANDARDS APPLY TO ALL UNEs AND THAT HIDDEN OR DUPLICATIVE CHARGES WILL NOT BE TOLERATED

The Supreme Court unequivocally upheld the Commission's authority to define the pricing methodology used by state commissions in setting rates for UNEs.[66] Pursuant to that authority, the Joint Commenters submit that the Commission should reaffirm in this proceeding

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65 *Local Competition First Report and Order* at ¶¶ 15, 545, 598-99. The same holds true for Internet service.

66 *AT&T Corp.* at 733.

that the TELRIC-pricing standards it has adopted apply to all UNEs. In so doing, the Commission should make clear that additional, duplicative, or hidden charges or subsidies are impermissible. Moreover, the Commission should articulate rules permitting volume and term discounts for UNEs where justified under TELRIC.

A. Conversion from Special Access to UNEs Must Be Free of Additional Charges

Many CLECs, including the Joint Commenters, have been forced to purchase special access circuits in order to obtain reasonable deployment intervals for facilities theoretically available as UNEs under interconnection agreements, but plagued by ILEC provisioning delays. This is especially true for high-capacity loops, including DS-1s. CLECs should not be penalized for the ILECs' inability (or refusal) to install UNEs in accordance with their statutory and contractual obligations. Accordingly, the Commission should adopt rules requiring ILECs to convert special access circuits to equivalent UNEs (or UNE combinations) after approval of an interconnection agreement between the CLEC and ILEC. Carriers with existing interconnection agreements must also be able to convert special access without penalty where CLECs have purchased special access to avoid unreasonable ILEC provisioning delays.

The Commission's "all elements rule" prevents ILECs from separating already combined elements, including elements that make up analogous special access circuits.[67] In endorsing this rule, the Supreme Court noted that, without such a rule, "incumbents could impose wasteful costs on even those carriers who requested less than the whole network."[68]

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67 47 CFR § 51.315(b).

68 *AT&T Corp.* at 735.

Existing special access circuits without question already are established, and thus ILECs are obligated to make these conversions.

The Commission should also clarify that special access-to-UNE conversions must be seamless. When Intermedia informed Bell Atlantic of its desire to convert its special access circuits to UNEs, Bell Atlantic stated that it would not simply re-price the existing circuit. Rather, Bell Atlantic would disconnect the special access circuit and re-establish a UNE circuit. According to Bell Atlantic's proposal, Intermedia would be responsible for all service disconnection charges on the special access circuit and installation charges on the UNE circuit. Such a process directly contradicts the Commission's "all element" rule, which was designed to prevent "incumbent LECs from 'disconnecting previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants.'"[69] At bottom, the Commission should clarify that a special access-to-UNE conversion is nothing more than a billing change and that ILECs may not impose service disruptions or additional charges on CLECs requesting such conversions.[70]

On a related point, under federal and state rules, CLECs presently are required to show either a 100% or 0% PIU on data circuits, even though these circuits typically handle mixed traffic. Moreover, it is essentially impossible to estimate accurately the ultimate

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69 *Id.* at 735 (quoting the Commission's reply brief).

70 In the AT&T /Bell Atlantic Arbitration Award, the Arbitrator notes that the parties stipulate to several important facts, including the fact that converting a special access circuit to a UNE would "require no change in the Circuit nor any change in the manner in which messages are transmitted through the current physical interconnection...." Moreover, the parties agreed that the conversion issue "is solely about the rate AT&T must bay [Bell Atlantic] for the service provided by the Circuit." AT&T/Bell Atlantic Arbitration Award at 2, attached hereto as **Exhibit B**.

destination of traffic travelling on data networks. In short, the existing PIU system simply does not work for packet-based traffic, and the Commission should use this opportunity to clarify that the PIU system has no place in the packet-switched world.

B. The Commission Should Not Permit "Glue" Charges on Top of TELRIC-Based Cross-Connect Charges

The Commission must clarify that where CLECs request UNEs in combination, ILECs may not impose "glue" charges – either recurring or nonrecurring – in addition to TELRIC cross-connection charges. The imposition of non-cost-based glue charges on UNEs without question contradicts the forward-looking pricing standard established by the Commission. To this end, as noted earlier, the Commission should clarify that costs for cross-connects must be included in the underlying transmission facility rate (either loop or transport), as such items are an integral part of the transmission provided by such UNEs.

C. The Commission Should Reaffirm that Access Charges Do Not Apply When Telecom Carriers Use UNEs to Provide Competitive Service

Previously, the Commission has found that CLECs using UNEs (or interconnection) to compete against ILEC access services do not pay access charges, and the Commission should reaffirm that decision here. In the *Local Competition First Report and Order*, the FCC specifically rejected ILEC arguments that CLECs purchasing UNEs must continue to pay access charges:

> We reject the argument advanced by a number of incumbent LECs that section 251(i) demonstrates that requesting carriers using unbundled elements must continue to pay access charges.... When interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access "services." They are purchasing a different

> product, and that product is the right to exclusive access or use of an entire elements.[71]
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> * * *
>
> We affirm our tentative conclusion in the NPRM that, telecommunications carriers purchasing unbundled network elements to provide interexchange services or exchange access services are not required to pay federal or state exchange access charges except as described in section VII, *infra*, for a temporary period.[72]
>
> The temporary exception discussed in this last statement expired in 1997.[73]

Moreover, under the FCC's rules, access charges never applied to carriers purchasing UNEs other than unbundled switching. In reestablishing the nationwide minimum list of UNEs, the Commission should reaffirm that access charges do not apply to competitive providers of exchange access.

D. The Commission Should Reaffirm that its Pricing Rules Exclude Subsidies and Embedded Access Charges

The Joint Commenters request that the Commission take this opportunity to reaffirm that its pricing standard excludes subsidies and embedded access charges. Interpreting the "based on cost" standard of section 252(d)(1), which applies to both interconnection and UNEs, the Commission endorsed the application of a TELRIC cost model.[74] As noted, the FCC's ability to set this costing methodology as a standard that must be adopted by state

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71 *Local Competition First Report And Order* at ¶ 358. *See also id.* at ¶ 191.

72 *Id.* at ¶ 363.

73 *Id.* at ¶ 720.

74 *E.g., Local Competition First Report and Order* at ¶ 699.

regulatory bodies was recently affirmed by the Supreme Court.[75] In defining its TELRIC standard, the FCC expressly *excluded* Universal Service Subsidies from the rates that ILECs could charge for both interconnection and UNEs:

> We conclude that funding for any universal service mechanisms adopted in the universal service proceeding may not be included in the rates for interconnection, network elements, and access to network elements that are arbitrated by the states under sections 251 and 252. Section s 254(d) and 254(e) of the 1996 Act mandate that universal service support be recovered in an equitable and nondiscriminatory manner from all providers of telecommunications services. We conclude that permitting states to include such costs in rates arbitrated under sections 251 and 252 would violate that requirement by requiring carriers to pay specified portions of such costs solely because they are purchasing services and elements under section 251. Section 252(d)(1) requires that rates for interconnection, network elements and access to network elements reflect the costs of providing those network elements, not the costs of supporting universal service.[76]
>
> * * *
>
> If a state collects universal service funding in rates for elements and services pursuant to sections 251 and 252, it will be imposing non-cost based charges in those rates. Including non-cost based charges in the rates for interconnection and unbundled elements is inconsistent with our rules implementing sections 251 and 252 which require that these rates be cost-based.... States may not, therefore, include universal service support funding in the rates for elements and services pursuant to section s 251 and 252, nor may they implement mechanisms that have the same effect.[77]

These finding should be reiterated here.

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75 *AT&T Corp.* at 733.

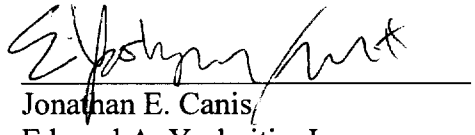
76 *Local Competition First Report and Order* at ¶ 712 (citations omitted).

77 *Id.* at ¶ 713.

V. CONCLUSION

For the foregoing reasons, the Joint Commenters respectfully submit that the Commission adopt a nationwide list of minimum UNEs consistent with these comments. In addition, the Commission should also promulgate UNE rules consistent with the positions advocated herein.

Respectfully submitted,



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MAY 26, 1999

A

NEW YORK INTERCONNECTION AGREEMENT
ARBITRATION

AT&T COMMUNICATIONS OF NEW YORK, INC.,	:	
Complainant,	:	
-against-	:	AWARD September 14, 1998
NEW YORK TELEPHONE COMPANY d/b/a BELL ATLANTIC-NEW YORK,	:	
Respondent.	:	

This case involves a single issue: the interpretation and application of Part 2, Section 2.9.5.2 of the Interconnection Agreement effective June 13, 1997 (the "Agreement") between New York Telephone Company d/b/a Bell Atlantic-New York f/k/a NYNEX ("BA-NY") and AT&T Communications of New York, Inc. ("AT&T").

This section provides as follows:

> 2.9.5.2. **"Dedicated Transport"** is an interoffice transmission path between designated locations to which a single carrier is granted exclusive use. Such locations may include NYNEX central offices or other equipment locations, AT&T network components, other carrier network components, or Customer premises. . . .

The dispute over the interpretation of Section 2.9.5.2 arises in connection with an order placed by AT&T with BA-NY on March 3, 1998, effective March 6, 1998, to purchase "Dedicated Transport" as an unbundled Network Element under the Agreement (the "Order"). AT&T placed the March 3 Order to purchases an already existing circuit (the "Circuit") between one of its local and long-distance telecommunications customers (the "Customer") at 90 Park Avenue, New York, and AT&T's point of presence ("POP") at 811 Tenth Avenue, New York, as a Dedicated Transport Network Element Under the Agreement. AT&T already provides service to the Customer pursuant to AT&T's interstate tariffs and an AT&T tariffed local service offering called "AT&T Digital Link®." A copy of the Order is attached to the Complaint in this case as Exhibit B.

The parties agree on some important points:

1. The Circuit is a dedicated circuit used exclusively by the Customer and AT&T.
2. The Circuit physically passes through BA-NY's Central Office between the Customer's premises and AT&T's POP.
3. The Circuit is a dedicated, hard-wired transmission path that requires no switching function at the BA-NY Central Office.
4. Servicing the Order will require no change in the Circuit nor any change in the manner in which messages are transmitted through the current physical Interconnection.
5. The definition of "Dedicated Transport" in Section 2.9.5.2, standing alone and without regard to other provisions of the Agreement, would encompass the Dedicated Transport facility requested by AT&T in the Order.
6. The dispute is solely about the rate AT&T must pay BA-NY for the service provided by the Circuit.

The disagreement among the parties revolves around what BA-NY contends is an "ambiguity" in the Agreement, namely that Section 2.9.5.2's definition of Dedicated Transport, if read literally as AT&T proposes, would cover what BA-NY contends is actually two unbundled Network Elements: the "Local Loop" between the Customer's premises and the NYNEX Central Office as defined in Section 2.9.1, and "Interoffice Transmission Facilities" between the NYNEX Central Office and AT&T's POP, as defined in Section 2.9.5.

AT&T claims that even though the foregoing may be true, the entire Circuit is Dedicated Transport under the Agreement because Section 2.9.5.2's definition of Dedicated Transport includes a transmission facility between two points, one of which may be the Customer's premises, the other of which may be AT&T's POP, as with the instant Order. BA-NY claims that "AT&T is skillfully trying to exploit an overlap in the definitions of the unbundled Local Loop and unbundled Dedicated Transport to achieve an unjustified price reduction . . . ." BA-NY claims that AT&T's proposed application of Section 2.9.5.2 would conflict with other provisions of the Agreement, with the definitions in the FCC Local Competition Order, particularly in regard to the provision of unbundled Network Elements, and with the definition of Dedicated Transport used by the NYPSC in its arbitration decision setting permanent rates. See Opinion and Order Setting Rates for First Group of Network Elements (Rate Order), in Opinion 97-2, Cases 95-C-0657 et al.

Specifically, BA-NY argues that the Local Loop portion of the Circuit cannot be both a separate unbundled Local Loop and part of unbundled Dedicated Transport. BA-NY points out that the Agreement provides for two separate and distinct rates for the Local Loop and Dedicated Transport, as well as for combinations of unbundled Network Elements. There would have been no need to combine these two elements and make them each part of the specific combinations in the Agreement, so BA-NY argues, if both the Local Loop and Dedicated Transport are defined as the facility extending to the Customer

premises, because Dedicated Transport alone would have sufficed. BA-NY urges that the only way to reconcile the inconsistency it sees between these definitions to give effect to the parties' overall intention, is to reject AT&T's reading of Section 2.9.5.2 and substitute the definition of unbundled Network Elements in the FCC Local Competition Order. That Order defines the Local Loop in a manner that is consistent with the definition of the Local Loop in the Agreement, but it defines Interoffice Transmission Facilities (of which Dedicated Transport is a subset) in a manner that would not extend from AT&T's POP to the Customer's premises, as Section 2.9.5.2 does. See Sections 51.319(a) and (d)(1)(i). BA-NY's position is that applying its interpretation of the Agreement to the Order will result in an order for two unbundled Network Elements, which it is happy to supply AT&T, albeit at the higher price AT&T would have to pay for two such orders. BA-NY is also willing to combine these two unbundled Network Elements pursuant to its intrastate tariffs, but again at rates higher than would apply if AT&T's interpretation prevails.

AT&T claims that there is no conflict or inconsistency in the Agreement's definition of Dedicated Transport with any other provision of the Agreement. Rather, AT&T urges, the various definitions of Local Loop, Dedicated Transport, and unbundled Network Elements show that the Agreement provides for a variety of service arrangements which may or may not overlap. Specifically, AT&T contends that the portion of the Circuit between the Customer's premises and BA-NY's Central Office can be both a Local Loop and part of unbundled Dedicated Transport under the Agreement. AT&T argues that nothing in New York law, the Telecommunications Act of 1996 the FCC Local Competition Order, or anything else prohibits the definition of an unbundled Network Element under a negotiated Interconnection Agreement from including facilities that are also subsumed in the definition of another unbundled Network Element. BA-NY concedes this point. Moreover, AT&T points out that the Telecommunications Act of 1996 (see section 252(a)(1), (e)(2)) and the FCC Local Competition Order (see section

366) empower parties to negotiate whatever definitions of unbundled network elements they choose in their interconnection agreements, and contends that this is just what the parties did in New York. AT&T objects that BA-NY is attempting to renege on what the parties negotiated because it does not like the terms of the bargain. Under its interpretation, AT&T may choose to order a DS-1 transmission facility between a Customer's premises and an AT&T POP as a single Network Element at a lower rate than would apply if the same transmission facility were ordered as a 4-wire conditioned Local Loop from the Customer's premises to BA-NY's Central Office combined with DS-1 Dedicated Transport from the BA-NY Central Office to AT&T's POP. AT&T claims that it negotiated specifically for such a price break and that BA-NY cannot now object simply because it does not like the deal. AT&T also denies that its interpretation conflicts with the Combinations of unbundled Network Elements in Part II of the Agreement because the Combinations envision the connection of other unbundled Network Elements, such as Local Switching, rather than the continuous transmission path that was ordered in this case.

The difference in price between the charge under the Agreement for Dedicated Transport and the Access Tariff charge for the Circuit is $394.56 per month. This price difference arises because the rated components of the Local Loop and Dedicated Transport are different, the former costing a fixed amount per month and the later being mileage-sensitive.

Thanks to the excellent briefs and reply briefs submitted by the parties, I feel that I understand the technical and legal issues in this case. The difficult question is whether Section 2.9.5.2's definition of Dedicated Transport is a mistake, an anomaly, a quirk – something that was unintentionally overlooked in the negotiation and drafting of the Interconnection Agreement – or whether it is an intentional choice that became part of the complex bargain between the parties that encompasses hundreds, if not thousands, of quid

pro quos. The parties have offered contrasting affidavits from their "lead negotiators" on the unbundled network services portion of the Agreement to buttress their contentions as to what the parties' intended when they drafted Section 2.9.5.2. Not surprisingly, these affidavits support each side's position and thus more or less cancel each other out. As always, one must look to the words of the contract itself.

On balance, I find that AT&T's proposed interpretation and application of Section 2.9.5.2 is persuasive in this case. As BA-NY concedes, the definition of Dedicated Transport in the Agreement covers this Order and there is nothing to prevent the parties from defining Dedicated Transport as they did in Section 2.9.5.2 to extend beyond the definition in the FCC Local Competition Order or to overlap with the definition of other unbundled Network Elements. Moreover, there is nothing inherently economically illogical in rating overlapping services differently so that the facilities or services may be ordered under separate definitions (and rates) depending on the circumstances. Most service and facility providers offer their customers these kinds of options. If the parties to the Interconnection Agreement negotiated these kinds of options, and if they are not prohibited from doing so under the Telecommunications Act of 1996, the FCC Local Competition Order, the NYPSC, or any other relevant law, their agreement must be given effect. Under familiar canons of contract construction cited by the parties in their briefs, an arbitrator must interpret the contract consistent with its plain meaning, and when the meaning is ambiguous, consistent with what the arbitrator finds was the intent of the parties. In performing these tasks, the arbitrator must avoid rendering the terms of the contract meaningless, and where there are general and specific provisions relating to the same matter, give greater due to the specific provisions.

AT&T argues that it anticipated the need for dedicated DS-1 level circuits from its POP to its customers' premises and negotiated with BA-NY for a definition of Dedicated Transport that treats such a transmission path as a single unbundled Network Element. It

is somewhat puzzling as to why BA-NY would have agreed to rates for such service where the mileage for the circuit is relatively short (as might often be the case in New York City), at such a potentially large variance from the rates it negotiated for just the Local Loop. However, it not within the arbitrator's power to second-guess such decisions nor to act as an unconstrained economic price-setting panel nor to sit as a "equitable" reformer of the parties' own agreement.

Based on the language of the Interconnection Agreement, specifically Section 2.9.5.2 but also the Agreement as a whole as it has been sited to me, I find that the definition of Dedicated Transport in the Agreement is clear and unambiguous and that the Order requests Dedicated Transport as defined in Section 2.9.5.2. Thus, AT&T is entitled to prompt acceptance and implementation of the Order and BA-NY is obliged to accept and implement the Order. AT&T is also entitled to and is hereby awarded damages in the amount of the difference between the Access Tariff price it has paid for the use of the Circuit since March 6, 1998, the effective date of the Order, and the price it would have paid under the Agreement had the Order been accepted as requested by AT&T, together with pre-judgment interest thereon. The parties are requested to submit further briefs solely on the quantification (not the entitlement) of these damages by September 25, 1998, so that a Final Award on damages may be made. The Final Award shall also include in the computation of damages an award of the Arbitrator's fees and expenses related to this proceeding pursuant to Section 16.1.13 of the Agreement. Each party shall bear its own attorneys fees and costs.

Eric D. Green
Arbitrator

Section 9 **Common Transport**

9.1 Definition:

Common Transport is an interoffice transmission path between NYNEX Network Elements (illustrated in Figure 2) shared by carriers. Where NYNEX Network Elements are connected by intra-office wiring, such wiring is provided as a part of the Network Elements and is not Common Transport. NYNEX shall offer Common Transport as of the Effective Date of the Agreement, at DS0, DS1, DS3, STS-1 or higher transmission bit rates. Common Transport consists of NYNEX inter-office transport rate facilities and is distinct and separate from local switching.

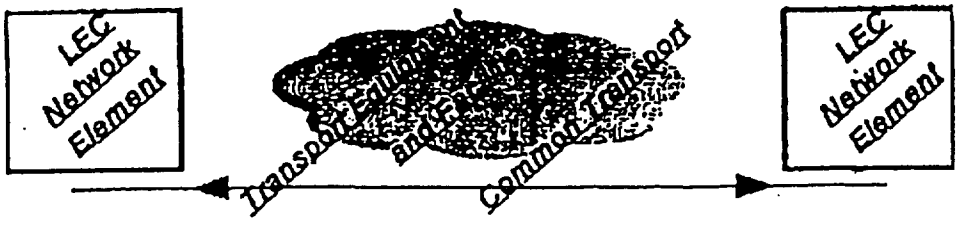

Figure 2

9.2 **Technical Requirements**

9.2.1 NYNEX shall be responsible for the engineering, provisioning, and maintenance of the underlying equipment and facilities that are used when it provides Common Transport.

9.2.2 At a minimum, where technically feasible Common Transport shall meet all of the relevant (for the transport technology being used) and applicable requirements set forth in Section 18.8.

Section 10. **Dedicated Transport**

10.1 **Definition:**

10.1.1 Dedicated Transport is an interoffice transmission path between designated locations to which a single carrier is granted exclusive use. Such locations may include NYNEX central offices or other locations, MCIm network components, other carrier network components, or subscriber premises. Dedicated Transport can be provided on either a switched or non-switched basis as depicted below in Figure 3.

B

Bell Atlantic Network Services, Inc.
1320 N. Courthouse Road
2nd Floor
Arlington, VA 22201

Telcom Industry Services

February 23, 1999

Mr. Jonathan E. Canis
Kelley Drye & Warren LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036

Dear Mr. Canis:

We have recently received your request to adopt specified provisions of another carrier's interconnection agreement pursuant to the FCC's so-called 'pick and choose' rule. As you are probably aware, the U.S. Court of Appeals for the 8th Circuit has not yet acted to reinstate the 'pick and choose' rule in accordance with the Supreme Court's January 25, 1999 decision. We anticipate that it will do so within the next month. Until then, Bell Atlantic is not in a position to act on your request.

Once the 'pick and choose' rule has been formally reinstated, you may resubmit your request. At that time we will consider the appropriateness of your request in light of the 8th Circuit's mandate, the provisions of the FCC's "pick and choose" rule, and all other relevant factors. A request that seeks to adopt a portion of an agreement from a different state, for example, or which omits other provisions which are legitimately related to those sought, may be rejected.

Sincerely,

Jeffrey A. Masoner/mab

Jeffrey A. Masoner
Vice President

cc: Jack H. White, Esq.